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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/863,773	05/23/2001	Thomas Patrick Luchino	JDC-375	2425

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EXAMINER

COLE, LAURA C

ART UNIT PAPER NUMBER

1744

6

DATE MAILED: 06/04/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/863,773

Applicant(s)

LUCHINO ET AL.

Examiner

Laura C Cole

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 07 February 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-25 is/are pending in the application.
- 4a) Of the above claim(s) 4-21 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3 and 22-25 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☒ Claim(s) 1-25 are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 23 May 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) <u>4, 5</u> . | 6) <input type="checkbox"/> Other: |

DETAILED ACTION

Election/Restrictions

1. This application contains claims directed to the following patentably distinct species of the claimed invention: Figures 1,1A, and 2; Figures 3 and 3A; Figures 4 and 4A; Figures 5 and 5A; Figures 6 and 6A; Figures 7 and 7A; Figures 8 and 8A; Figures 9 and 9A; Figures 10 and 10A; Figures 11 and 11A.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, none are generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which are written in dependent form or otherwise include all the limitations of an allowed generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

Should applicant traverse on the ground that the species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the

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case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other invention.

During a telephone conversation with Lawrence D. Schuler on 22 May 2003 a provisional election was made without traverse to prosecute the invention of Figures 9 and 9A, claims 1-3 and 22-25. Affirmation of this election must be made by applicant in replying to this Office action. Claims 4-21 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

Double Patenting

2. Claims 1 and 3 provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1 and 2 of copending Application No. 09/461,891. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

Claim Objections

3. Claims 1-3 and 22-25 are objected to because of the following informalities:

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Claim 1 Line 9, Claim 3 Line 2, Claim 22 Line 7, and Claim 23 Line 2 each recites a "first" type of bristle. There is not a second, third, etc. type of bristle claimed.

Appropriate correction is required.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1 and 3 are rejected under 35 U.S.C. 102(b) as being anticipated by Eguchi, USPN 4,963,046.

Eguchi discloses a toothbrush that comprises a handle (Figures 3 and 4 (5)), a toothbrush head distal to the handle (Figures 3 and 4 (3)), a multiplicity of bristles having a diameter ranging from 0.25 mm to 0.60 mm (Column 2 Lines 32-36 disclose 1.524 mm, 381 6/1000 – 15/1000 which falls into the range) being individually embedded in the toothbrush head (Figures 3, 4, 5, 6, and 8 (1)), wherein the bristles are mutually spaced apart by a distance of 0.5 times to about 10 times the diameter of the bristles (Figure 2.) One bristle may be 0.35 mm (falling into the range of 0.35-0.60 mm) while another is also 0.35 mm (falling into the range of 0.25 mm – 0.35 mm), as mentioned above.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and

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the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

5. Claims 1 and 3 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Taylor, USPN 4,804,004.

Taylor discloses a mascara brush that comprises a handle (Figures 3 (16)), a brush head distal to the handle (Figure 3), a multiplicity of bristles having a diameter ranging from 0.25 mm to 0.60 mm (Column 5 Lines 50-55) being individually embedded in the toothbrush head (Figure 3 (32')). One bristle may be 0.35 mm (falling into the range of about 0.35-0.60 mm) while another is also about 0.35 mm (falling into the range of 0.25 mm – 0.35 mm), as mentioned above. Taylor does not disclose a mutual spacing of 0.5 to about 10 times the diameter of the bristle, however in Figure 3 it appears that the individual bristle falls into that range.

It would have been obvious for one of ordinary skill in the art to space individual bristles in a range of about 0.5 to 10 times the diameter of the bristle so that in between

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bristles it may be properly cleaned and can hold a proper amount of liquid material or cleaning solution.

6. Claims 1-3, 22, 23, and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Berge, USPN 5,836,033 in view of Eguchi, USPN 4,963,046.

Berge discloses a toothbrush for brushing teeth and massaging gums that comprises a handle (Figure 4 (201)), a toothbrush head distal to the handle (Figures 4, 6, and 7), and both individually mounted bristles (Figures 6 and 7 (304n) and (305n)) and at least one dense tuft of bristles of a circular shape (Figures 6 and 7 (303a)). The individual bristles appear to be mutually spaced apart by a distance ranging from about 0.5 times to about 10 times the diameter of the bristle (as it appears in Figures 6 and 7). The dense tuft of bristles may be distal (as shown in Figures 6 and 7). Berge does not disclose a specific diameter for the first type of individually embedded bristles.

As stated above, Eguchi discloses individually embedded or mounted bristles that have a diameter that range from about 0.25 mm to 0.60 mm, wherein the bristles may be even more specifically 0.35 mm which is advantageous for bristles to massage the users gums.

It would have been obvious for one of ordinary skill in the art to substitute the individually embedded bristles of Berge for ones that Eguchi teaches to provide an ideal specific diameter that would have a massaging effect on the gums without being too damaging to the tissue.

7. Claims 1-3 and 22-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Thompson, USPN 301,644 in view of Eguchi, USPN 4,963,046.

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Thompson discloses a toothbrush for brushing teeth and massaging gums that comprises a handle (Figures 3-7 (a)), a toothbrush head distal to the handle (Figures 3-7), and both individually mounted bristles (Figure 4 (d)) and at least one dense tuft of bristles of a circular cross section (Figures 4 and 9-11, unlabeled). The individual bristles appear to be mutually spaced apart by a distance ranging from about 0.5 times to about 10 times the diameter of the bristle (as it appears in Figure 8). The dense tuft of bristles may be distal (as shown in Figures 4-11). Thompson does not disclose a specific diameter for the first type of individually embedded bristles.

As stated above, Eguchi discloses individually embedded or mounted bristles that have a diameter that range from about 0.25 mm to 0.60 mm, wherein the bristles may be even more specifically 0.35 mm which is advantageous for bristles to massage the users gums.

It would have been obvious for one of ordinary skill in the art to substitute the individually embedded bristles of Thompson for ones that Eguchi teaches to provide an ideal specific diameter that would have a massaging effect on the gums without being too damaging to the tissue.

8. Claims 1-3 and 22-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Libby, USPN 1,251,250 in view of Eguchi, USPN 4,963,046.

Libby discloses a toothbrush for brushing teeth and massaging gums that comprises a handle (Figures 1-3 (1)), a toothbrush head distal to the handle (Figures 1-4), and both individually mounted bristles (Figures 2 and 4 (14)) and at least one dense tuft of bristles (Figures 2-4 (7)) that is of an elongated rectangular shape (Figures 2-4

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(7)). The individual bristles appear to be mutually spaced apart by a distance ranging from about 0.5 times to about 10 times the diameter of the bristle (as it appears in Figure 1). The dense tuft of bristles may be distal (as shown in Figures 1-3). Libby does not disclose a specific diameter for the first type of individually embedded bristles.

As stated above, Eguchi discloses individually embedded or mounted bristles that have a diameter that range from about 0.25 mm to 0.60 mm, wherein the bristles may be even more specifically 0.35 mm which is advantageous for bristles to massage the users gums.

It would have been obvious for one of ordinary skill in the art to substitute the individually embedded bristles of Libby for ones that Eguchi teaches to provide an ideal specific diameter that would have a massaging effect on the gums without being too damaging to the tissue.

Conclusion

9. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

USPN 6,374,448 to Seifert discloses a variety of shapes of tufts in Figure 9.

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Laura C Cole whose telephone number is (703) 305-7279. The examiner can normally be reached on Monday-Thursday, 7am - 4:30pm, alternating Fridays.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert Warden can be reached on (703) 308-2920. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 746-8772 for regular communications and (703) 873-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

LCC
LCC
May 29, 2003

Robert J. Warden, Sr.
ROBERT J. WARDEN, SR.
SUPERVISORY PATENT EXAMINER
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